

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

JAMES EDWARD CLAYTON,)
)
Petitioner,)
)
v.) **Case No. CIV 06-014-FHS-KEW**
)
JUSTIN JONES, DOC Director,)
)
Respondent.)

RESPONSE TO THE TENTH CIRCUIT COURT OF APPEALS' REMAND

The respondent appealed this court's order granting petitioner a conditional writ of habeas corpus. The court had found petitioner received ineffective assistance of counsel when his attorney ignored instructions to file an appeal after his guilty plea, so it was ordered that the case be held in abeyance for no longer than 120 days, so petitioner could withdraw his plea. The Tenth Circuit Court of Appeals affirmed the determination that petitioner was entitled to habeas relief, but remanded the matter for an explanation of the reasons for the remedy given. *Clayton v. Jones*, 700 F.3d 435 (10th Cir. 2012).

In making the decision regarding petitioner's remedy, the district court considered the length of petitioner's incarceration, giving weight to the fact that he had yet to receive constitutionally-sufficient due process. Upon careful review of the record and further reflection, however, the court hereby finds that the remedy previously ordered was incorrect and should be corrected to an order directing the state courts to provide petitioner with an out-of-time appeal. *See Baker v. Kaiser*, 929 F.2d 1495, 1500 (10th Cir. 1991) ("[T]he appropriate remedy [when a defendant is denied the right to appeal because of ineffective

assistance of counsel] is to grant his petition for a writ of habeas corpus unless the . . . state courts provide him with an out of time appeal within a reasonable time.”). The court, therefore, finds this case should be held in abeyance for no longer than ninety (90) days, during which time the State of Oklahoma may, by whatever procedure it deems appropriate, grant petitioner leave to appeal out of time. *See Baker*, 929 F.2d at 1500-01.

DATED this 14th day of January, 2013.



Frank H. Seay
United States District Judge